Unabomber

GOVERNMENT'S TRIAL BRIEF

Nov. 12, 1997

IV. EVIDENTIARY ISSUES

A. Admissibility of the Government's Evidence

As set forth in more detail below, the government intends to introduce a variety of documentary, photographic, scientific, demonstrative and other types of evidence in its case in chief. In subsection one, the government discusses a foundational requirement common to each of these types of evidence: authentication. In the sections which follow we discuss specific issues related to each category of evidence.

1. Authentication Generally

In seeking to authenticate an item of evidence, the government must merely present proof that the evidence is what the government claims it is. Federal Rules of Evidence, Rule 901(a). Rule 901(a) states: "The requirement of authentication as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Thus, the government need not prove the authenticity of its proffered evidence outright. Rather, for an item of evidence to be admissible, FRE 901(a) requires that "[t]he government need only make a prima facie showing of authenticity so that a reasonable juror could find in favor of authenticity or identification.'" United States v. Workinger, 90 F.3d 1409, 1415 (9th Cir. 1996); United States V. Chu Kong Yin, 935 F.2d 990, 996 (9th Cir. 1991); United States V. Blackwood, 878 F.2d 1200, 1202 (9th Cir. 1989). Therefore, the test for authenticity is "whether the proponent has presented sufficient

evidence to support a rational jury finding that[, for example,] the letter is genuine, or the photograph is accurate. The trial judge looks to only the proponent's evidence and asks that question of law." EDWARD J. IMWINKELRIED, EVIDENTIARY FOUNDATIONS 35 (3rd ed. 1995). See United States v. Johnson, 637 F.2d 1224, 1247 (9th Cir. 1980) ("The terms of the Rule are thus satisfied, and the proffered evidence should ordinarily be admitted, once a prima facie case has been made on the issue").

"Once the government meets this burden [of showing prima facie authenticity,] 'the ... probative force of the evidence offered is, ultimately, an issue for the jury.'" Workinger at 1415; Chu Kong Yin at 996; Blackwood, 878 F.2d at 1202. Johnson, 637 F.2d at 1247 ("At that point the matter is committed to the trier of fact to determine the evidence's credibility and probative force"). The requirement of authentication is thus the paradigm of a preliminary question under Rule 104(b). 1 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 104.30[3] at 104-68 (Joseph M. Mclaughlin ed., 2nd ed. 1997); 5 WEINSTEIN § 901.02[4] at 901-15. See IMWINKELRIED at 35 ("[A]s is generally true under Rule 104(b), there is a two-step procedure; the judge initially plays a limited, screening role, and the jury then makes the final decisions on the question of fact") . See also United States v. Browne, 829 F.2d 760, 766 (9th Cir. 1987) , cert. denied, 485 U.S. 991 (1988) (holding gun properly authenticated as being linked to robbery by witness testimony, jury should decide whether gun admitted was actually used in robbery). (*6. The issue of a preliminary hearing pursuant to FRE 104 (a) is addressed in more detail at pages 71-75, infra.*)

2. Photographic Evidence

The government intends to introduce photographs of most of the Unabom crime scenes, including the cabin, and laboratory photographs of bomb components and other crime scene evidence and autopsy photographs. The foundation for photographic evidence may be laid in a variety of ways.

a. Witness verification may authenticate a photograph

Photographs may be authenticated by witness testimony. FRE 901(b) (1), (4). See WEINSTEIN § 901.02[3] at 901-14. In Guam v. Ojeda, 758 F.2d 403, 407-08 (9th Cir. 1985), the Ninth Circuit set forth its standard for witness authentication of photographs. Noting a presumption of regularity in the handling of photographs by public officials, the court held that under Rule 901(b) (1), "the witness identifying the item in a photograph need only establish that the photograph is an accurate portrayal of the item in question." Id. Accordingly, the Ojeda court rejected the defendant's claim that, in order to admit photographs, the government must establish chain of custody for the items depicted in the photos. Id.; see also United States v. Flores, 63 F.3d 1342, 1363 (9th Cir. 1995) (holding that photograph depicting evidence misplaced by government before trial was properly admitted as accurate representation of what investigator saw when he looked inside defendant's car).

Photographs are thus authenticated, and should be admitted, if the jury can reasonably conclude that the photos depict what the government claims

they do. United States v. Blackwell, 694 F.2d 1325 (D.C. Cir. 1982). The government is not required to establish when or by whom the photo was taken. Banghart v. Origoverken, 49 F.3d 1302, 1304 (9th Cir. 1995). Nor is the government required to show that the photograph duplicates the conditions which existed at the time the crime was committed. United States v. Crockett, 49 F.3d 1357, 1360 (8th Cir. 1995) (photo of crime scene taken during daytime properly admitted even though crime occurred at night); United States V. Dombrowski, 877 F.2d 520, 525 (7th Cir. 1989) (crime scene photograph properly admitted even though photo did not accurately depict lighting conditions on night in question) . See also United States v. Mojica, 746 F.2d 242, 245 (5th Cir. 1984) ("[i]n the absence of a showing to the contrary, we presume that the government did not deliberately alter the scene before photographing it to cause the photograph to misrepresent the facts"), citing United States v. Stearns, 550 F.2d 1167, 1170 (9th Cir. 1977) (noting presumption of regularity in the handling of photographs by public officials).

The foundational elements for witness authentication of a photograph are:

1. The witness is familiar with the object or scene.
2. The witness explains the basis for his or her familiarity with the object or scene.
3. The witness recognizes the object or scene in the photograph.
4. The photograph is a "fair," "accurate," "true," or "good" depiction of the object or scene.

IMWINKELRIED at 75.

back to top

b. Content and circumstantial evidence may authenticate a photograph

Photographs may also be authenticated by their content and supporting circumstantial evidence. FRE 901(b) (1), (4). See WEINSTEIN § 901.02[3] at 901-14. In United States v. Englebrecht, 917 F.2d 376, 378 (9th Cir. 1990), the defendant claimed that the trial court abused its discretion in admitting certain photographs. Pictures of the defendant posing next to marijuana plants had been admitted into evidence during the defendant's trial. The defendant argued that the government did not adequately establish the time at which or place where photographs of him posing next to marijuana plants were taken, and that the photos were thus not properly authenticated. Id. The Ninth Circuit rejected the defendant's claim, holding that the contents of the photograph and corroborative witness testimony adequately established that the photographs pictured what the government claimed. (*7. The court noted the following circumstantial evidence: l)The photos were found in the defendant's home on the day of his arrest, 2) one of the defendant's drug customers testified that the defendant had shown him the photos and boasted that he owned the pictured marijuana crop, 3) a detective testified that the background in the photos matched an area of the farm next to the defendant's property, and 4) another one of the defendant's customers testified that the marijuana in the pictures was grown in 1988, and that 1988 was the only year during which the defendant grew marijuana. Englebrecht, 917 F.2d at 378.*) Id., citing Blackwell, 694 F.2d at 1330 (holding circumstantial evidence made photographs seized from defendant's hotel

room admissible even though no witness could testify as to when, where, or by what process they were taken, or whether they fairly and accurately depicted any particular scene on any particular date).

c. Graphic photographs are not inadmissible

The government intends to introduce autopsy photographs and x-rays of Hugh Scrutton, crime scene and autopsy photographs and x-rays of Gilbert Murray, and crime scene and hospital photographs of Drs. Charles Epstein and David Gelernter. These photographs and x-rays will be offered to depict the crime scene, the identity of the victim, the manner of death or nature of the injuries, the destructive power of the bomb and thus the defendant's lethal intent, and other issues relevant to the government's burden of proof.

Crime scene and autopsy photographs in homicide cases are frequently unpleasant, however, "gruesomeness alone does not make photographs inadmissible." United States v. Naranjo, 710 F.2d 1465, 1468-69 (10th Cir. 1983). In United States v. Yahweh, 792 F.Supp. 104, 105 (S.D. Fla. 1992), which the court described as "arguably the most violent case ever tried in federal court", the court explained its admission of particularly gruesome photographs:

> The subject matter of the photographs in question -- decapitation, slit throat, removed ears, repeated stabbing, gunshot wounds - - is both difficult to view as well as disturbing and distasteful. However, so were the crimes alleged. Murder, especially "murder most foul" by methods such as decapitation or stabbing and the removal of body parts, is inherently offensive. However, these exhibits are not flagrantly or deliberately gruesome depictions of the crimes.

The Court in United States v. Naranjo, 710 F.2d at 1468-69, expressed a similar view when it upheld the admissibility of graphic photographs of a murder victim who had been shot in the face:

> In our court system, juries are entrusted with the weighty obligation to find the facts in criminal cases of grave importance, such as the one before us. We think it is incompatible with that degree of trust to attempt to "protect" them from the evidence questioned here. It was part of the surroundings of the scene of the crime.

See also United States v. Kaiser, 545 F.2d 467, 476 (5th Cir. 1977) (admitting photographs of murder victim which were "upsetting" but which were not "in any respect more gruesome than is inherent in any visual record of a murder."); and Walle v. Sigler, 456 F.2d 1153, 1155 (8th Cir. 1972) (while photograph of murder victim was "gruesome", "this condition is an inherent and inseparable part of the crime with which the defendant was charged").

As with other types of evidence, the trial court must balance the probative value of the graphic photographs against their prejudicial effect and the exercise of such discretion is "rarely disturbed." United States v. Goseyun, 789 F.2d 1386, 1387 (9th Cir. 1986); United States v. Brady, 579 F.2d

1121, 1129 (9th Cir. 1978); United States v. Sides, 944 F.2d 1544, 1562 (10th Cir. 1991). In United States v. McRae, 593 F.2d 700, 707 (5th Cir. 1979), where the court upheld the admission of graphic photographs of the murder victim, the Court explained the reason for a restrained use Rule 403:

> Unless trials are to be conducted on scenarios, on unreal facts tailored and sanitized for the occasion, the application of Rule 403 must be cautious and sparing. Its major function is limited to excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect. As to such, Rule 403 is meant to relax the iron rule of relevance, to permit the trial judge to preserve the fairness of the proceedings by exclusion despite relevance. It is not designed to "even out" the weight of the evidence, to mitigate a crime, or to make a contest where there is little or none.

See also United States v. De Parias, 805 F.2d 1447, 1454 (11th Cir. 1986) (noting that "Rule 403 is to be very sparingly used").

back to top

(1) Crime Scene Photographs

Photographs of homicide victims are relevant to show the identity of the victim, the manner of death, the murder weapon and any other element of the crime. United States v. De Parias, 805 F.2d at 1453; United States v. Yahweh, 792 F.Supp. 104, 105 (S.D. Fla. 1992); United States v. Goseyun, 789 F.2d 1386, 1387 (9th Cir. 1986). Such photographs also enable witnesses to better describe and the jury to better understand testimony concerning the description and identity of the place where the crime occurred, the atmoshere in which the crime was committed, the identity of the victim and the degree of the crime committed. Walle v. Sigler, 456 F.2d 1153, 1155 (8th Cir. 1972); United States v. Sides, 944 F.2d 1554, 1563 (10th Cir. 1991).

Photographs of the murder victim taken at the crime scene have been admitted despite their graphic content. See, e.g., United States v. McRae, 593 F.2d at 707 (admitting photograph of back of victim's head "so as to display an exit wound in the back of her skull produced by part of McRae's dum-dum bullet, which exploded in her brain" and a photograph showing "a front view of her body, seated in the chair where she died, her left eye disfigured by the bullet's entry and her head broken by its force".); United States v. Sides, 944 F.2d 1554, 1563 (10th Cir. 1991) (admitting photographs of elderly couple bound and gagged with gunshot wounds to the head); United States v. Treas-Wilson, 3 F.3d 1406, 1410 (10th Cir. 1993) (admitting photographs depicting stab wounds to neck); United States v. Naranjo, 710 F.2d 1465, 1468-69 (10th Cir. 1983) (admitting photographs depicting victim on the bed with gunshot wound to face and a great deal of blood on pillow and bedsheets); United States v. Fleming, 594 F.2d 598, 607-08 (7th Cir. 1979) (admitting photograph of gunshot victim's nude and bound body); United States v. Brady, 579 F.2d 1121, 1129 (9th Cir. 1978) (admitting photographs of victims battered, bloodied and bruised face which "were not for the faint hearted"); Walle v. Sigler,

456 F.2d 1153, 1154 (8th Cir 1972) (admitting photographs of clothed and bloodied body of gunshot victim).

(2) Autopsy Photographs

Autopsy photographs of the murder victim have been admitted despite their graphic content where they will assist in explaining or illustrating the testimony of the pathologist. See, e.g., United States v. Stifel, 433 F.2d 431, 441-42 (6th Cir. 1970) (death caused by mail bomb which "tore open his abdomen and tore off his arms") ; United States v. Lewis, 92 F.3d 1371, 1383 (5th Cir. 1996) (battered child) ; United States v. Treas-Wilson, 3 F.3d 1406, 1410 (10th Cir. 1993) (death by stab wounds to the neck); United States v. Boise, 916 F.2d 497, 504 (9th Cir. 1990) (battered child); United States v. Soundingsides, 820 F.2d 1232, 1243 (10th Cir. 1987) (beating death); Walle v. Sigler, 496 F.2d 1153, 1154 (8th Cir. 1972) (nude photographs of gunshot victim); United States v. Yahweh, 792 F.Supp 104, 105 (S.D. Fla 1992) (14 deaths caused by beheading, stabbing, pistol shots, plus severing of body parts).

Because of the different purposes for which they are introduced, the prosecution's use of crime scene photographs of the victim does not render its use of autopsy photographs cumulative. United States v. De Parias, 805 F.2d at 1454. As the DeParias court explained: "Rule 403 does not mandate exclusion merely because some overlap exists between the photographs and other evidence." Indeed, in many of the cases cited above the government admitted both crime scene and autopsy photographs.

(3) Photographs Are Admissible Even If Matter in Issue Is Not Controverted

A plea of not guilty puts the prosecution to its proof as to all elements of the crime charged. United States v. Mathews, 485 U.S. 58, 64-65 (1988). Further, a defendant's tactical decision not to contest an essential element of the crime does not remove the government's burden to prove that element. Estelle v. McGuire, 502 U.S. 62, 69 (1991). As a consequence, in a homicide case, the government is required to prove the cause of death even though the defendant does not controvert, or even stipulates, to the cause of death.

In Walle v. Sigler, 456 F.2d at 1154, the defendant was charged with murdering his wife. Because his defense was limited to alibi and a general denial, and because he did not seek to controvert the manner or cause of death, the defendant objected to the introduction of crime scene and autopsy photographs of the victim on the ground that they had no probative value and were intended to prejudice the jury. The Court rejected that argument.

Even where the defendant stipulates to the cause of death that fact does not preclude the prosecution from offering photographic evidence on that issue. United States v. Bowers, 660 F.2d 527, 530 (5th Cir. 1981).

back to top

(4) Bombing Cases

Bombing cases present no special issues regarding the admission of graphic photographs of the victims. In bombing cases, graphic photographs of post-blast injuries have been admitted to prove a statutory enhancement, United States v. Moton, 493 F.2d 30, 31 (5th Cir. 1974) (photograph of child who had been burned by explosive device admitted to prove injury occurred under 18 U.S.C. §844(d)), to show the force of the explosion and the lethal intent, United States v. Stifel, 433 F.2d 43l, 442 (6th Cir. 1970) , and to assist the government pathologist in explaining and illustrating his findings. United States v. Cheely, 1997 WL 265000 (9th Cir. 1997) (unpublished opinion). Photographs of the scene of the explosion have also been admitted as probative of the crime scene. United States v. Sanchez, 992 F.2d 1143, 1160 (11th Cir. 1993). See also United States v. Stifel, 433 F.2d 431, 442 (6th Cir. 1970) (admitting two photos of bombing victim whose abdomen was "torn open" and both arms "torn off"; "the unanimous view of our panel [is] that under no circumstances could the horror of this crime have been kept from the jury").

3. Physical Evidence

The government will also seek to introduce physical evidence consisting primarily of bomb components from some of the Unabom crime scenes, bomb components (including the cabin bomb) and bomb-making tools taken from the cabin, and other items of physical evidence taken from the cabin such as stamps, address labels and books. Some of these items are readily identifiable by a unique or distinctive feature such as a bomb component containing the initials or a mailing label bearing the address of the intended victim. Other items which are not unique or distinctive will be identified by establishing a chain of custody.

In United States v. Abreu, 952 F.2d 1458, 1467 (1st Cir. 1992), the Court set forth the standard for authentication of physical evidence. Physical evidence may be authenticated by establishing ready identifiability, or in the alternative, chain of custody:

> The evidence in question is properly admitted if it is readily identifiable by a unique feature or other identifying mark. On the other hand, if the offered evidence is of the type that is not readily identifiable or is susceptible to alteration, a testimonial tracing of the chain of custody is necessary. Id.

a. Physical evidence may be authenticated by its readily identifiable characteristics

Rule 901(b) expressly permits authentication of an object by its distinctive characteristics. FRE 901(b) (4). Hence, if the proffered evidence is unique, readily identifiable and relatively resistant to change, the foundation need only consist of testimony that the evidence is what the proponent claims. United States v. Cardenas, 864 F.2d 1528, 1531 (10th Cir. 1989); United States v. Clonts, 966 F.2d 1366, 1368 (10th Cir. 1992); United States v. Hernandez-Herrera, 952 F.2d 342, 344 (10th Cir. 1991). The foundational elements for witness authentication of an object based on its ready identifiability are:

1. The object has a unique characteristic.
2. The witness observed the characteristic on a previous occasion.
3. The witness identifies the exhibit as the object.
4. The witness bases his or her identification of the object on his or her present recognition of the characteristic.
5. As best as the witness can tell, the exhibit is in the same condition as it was when he or she initially observed the object.

IMWINKELRIED at 71. See, e.g., United States v. Phillips, 640 F.2d 87, 94 (7th Cir. 1981) (chain of custody not required where witness positively identified clothing she was wearing on day of kidnaping); United States v. McFadden, 458 F.2d 440, 441 (6th Cir. 1972) (chain of custody not required where bank teller identified robber's demand note) ; Scruggs v. United States, 450 F.2d 359, 361 (8th Cir. 1971) (chain of custody not required where officer identified metal tube as the one he seized from defendant's apartment); United States v. Blue, 440 F.2d 300, 303 (7th Cir. 1971) (chain of custody not required where witness identified 22 silver dollars as ones which he had previously purchased). Furthermore, an otherwise non-unique item may become distinctive for identification purposes by the addition of an evidence tag bearing the initials of the officer who seized the item. See, e.g., United States v. Abreu, 952 F.2d 1458, 1461 (1st Cir. 1992) (Shotgun with evidence tag); United States V. Barker, 27 F.3d 1287, 1292 (7th Cir. 1994) (chain of custody not required given officer's testimony that he recognized gun based on its make, model, serial number and evidence tag).

b. Physical evidence may be authenticated by establishing a chain of custody

Absent unique or readily identifiable characteristics an item of physical evidence is admissible if the trial court determines that "a reasonable probability exists that the evidence has not been changed or altered." United States v. Cannon, 88 F.3d 1495, 1503 (8th Cir. 1996); United States v. Allen, 106 F.3d 695, 700 (6th Cir. 1997). The factors to be considered by the trial judge in deciding whether this criterion has been met include the nature of the article, the circumstances surrounding its preservation and custody, and the likelihood of intermeddlers having tampered with it. Gallego V. United States, 276 F.2d 914, 917 (9th Cir. 1960); United States v. Mora, 845 F.2d 233, 236 (10th Cir. 1988); United States v. Brown, 482 F.2d 1226, 1228 (8th Cir. 1973).

Merely raising the possibility of tampering is insufficient to render evidence inadmissible. United States v. Allen, 106 F.3d at 700; United States v. Harrington, 923 F.2d 1371, 1374 (9th Cir. 1991). Where there is no evidence indicating that tampering with the exhibits occurred, courts presume public officials have discharged their duties properly. Id.; United States v. Johnson, 977 F.2d 1360, 1367-68 (10th Cir. 1992) (no evidence that exhibits had been tampered with); United States v. Cannon, 88 F.3d at 1503 (defendant adduced no facts rebutting the presumption of integrity of physical evidence); United States v. Aviles, 623 F.2d 1192, 1197-98 (7th Cir. 1980). Accordingly, in order to make a sufficient showing of an object's authenticity, the government must establish chain of custody only to the extent that it renders it unlikely that the object has been altered. See Abreu, 952 F.2d at 1467 ("The purpose of testimonial tracing [of the chain

of custody] is to render it improbable that the original item either has been exchanged with another or has been tampered with or contaminated"). Once this prima facie showing has been made, the preliminary issue of admissibility has been determined. United States v. Kelly, 14 F.3d 1169, 1175 (7th Cir. 1994) ("All the government must show is that reasonable precautions were taken to preserve the original condition of evidence; an adequate chain of custody can be shown even if all possibilities of tampering are not excluded.") . See United States v. Blackwood, 878 F.2d 1200, 1202 (9th Cir. 1989). Any subsequent challenges as to weaknesses or breaks in the chain of custody go to the weight rather than the admissibility of the evidence. United States v. Robinson, 967 F.2d 287, 292-92 (9th Cir. 1992) (discrepancy between dates on bags of cocaine introduced into evidence and testimony concerning date of seizure went to weight not admissibility); United States v. Allen, 106 F.3d 695, 700 (6th Cir. 1997) (failure to identify every individual who handled or conceivably had access to marijuana did not defeat chain of custody); United States v. Crawford, 52 F.3d 1303, 1310-11 (5th Cir. 1995); United States v. Lopez, 758 F.2d 1517, 1521 (11th Cir. 1985); United States v. Washington, 11 F.3d 1510, 1514 (10th Cir. 1993); United States v. Boykins, 9 F.3d 1278, 1284-85 (7th Cir. 1993) (evidence admissible despite the fact that supervising officer could not recall from which officers he had received the two bags of cocaine). Accordingly, the adequacy of the proof relating to the chain of custody is not a proper ground to challenge the admissibility of the evidence. United States v. Lopez, 758 F.2d at 1521.

The presence or possibility of a "missing link," or break in the chain of custody does not preclude authentication of physical evidence. See United States v. Cannon, 88 F.3d 1495, 1503 (8th Cir. 1996) (Defendant's argument that government failed to show what happened to cocaine between time it was mailed to DEA lab and the time it was tested by a DEA chemist did not rebut presumption of integrity of evidence); United States v. Ricco, 52 F.3d 58, 61-62 (4th Cir. 1995) (chain of custody evidence was sufficient despite "missing link," since there was adequate proof that evidence was what it purported to be and had not been altered); United States v. Gelzer, 50 F.3d 1133, 1141 (2d Cir. 1995) (prosecution's decision not to call every witness who handled gun before trial did not call into question authenticity of gun); United States v. Howard-Arias, 679 F.2d 363, 366 (4th Cir.), cert. denied, 459 U.S. 874 (1982) (failure of one agent in chain of custody to testify at trial not fatal to admissibility of seized marijuana). See also United States v. Jardina, 747 F.2d 945, 951 (5th Cir. 1984) (evidence that bank employee found counterfeit bill in gas station deposit, that bill had same coloration as other counterfeit bills, that bill had identical serial number as 20 of 21 counterfeit bills found in defendant's car, and that only one counterfeit bill was found in gas station deposits, was sufficient to establish chain of custody for bill in question).

For physical evidence, the foundational elements for establishing chain of custody sufficient for a prima facie showing of authenticity are:

1. The witness (link in the chain) initially received the object at a certain time and place.
2. The witness safeguarded the object; the witness testifies to circumstances making it unlikely that substitution or tampering occurred.

3. The witness ultimately disposed of the object (retention, destruction, or transfer to another person).
4. As best as he or she can tell, the exhibit is the object he or she previously handled.
5. As best as he or she can tell, the exhibit is in the same condition as it was when he or she ultimately received the object.

IMWINKELRIED at 71-72.

In United States v. Harrington, 923 F.2d 1371, 1374 (9th Cir. 1991), the Court held the foundation sufficiently established where an officer testified that he was present when the criminalist placed the recovered items into a bag, that the bag which he examined at the time of trial contained all of the recovered items and that a record attached to the bag indicated where the bag had been from its seizure until the time of trial, and who had viewed or possessed the bag.

back to top

4. Documentary Evidence

A large component of the government's evidence will be private writings seized from the defendant's cabin. Some of these documents are handwritten and others are typewritten.

With respect to the handwritten documents, the defendant has stipulated that all of the writings that the government will seek to introduce were written by the defendant. With two exceptions, the government submits that these documents are admissible without further foundation. The two exceptions are for documents that were written in code and those which were written in Spanish. With respect to these documents the government will offer expert testimony regarding the translation and decoding of these documents.

With respect to the typewritten documents, the government will show that, in addition to being seized from the defendant's cabin, these documents were typed on a typewriter found in the defendant's cabin and, in some cases, also bear the defendant's handwriting.

For ease of discussion, the documents can be roughly divided into a few broad categories: (1) diaries or journals, (2) notes of scientific experimentation, (3) correspondence, (4) Unabom documents found in the cabin (e.g., the manifesto and accompanying letters, copies of letters sent with bombs, etc.), and (5) notes, lists, bus schedules and other writings pertaining to issues in the case such as actual or potential bomb victims, Unabom themes (e.g., hatred of people, anti-technology views) , and travel associated with specific Unabom events.

The documents, whether handwritten or typewritten, will be offered for a variety of purposes. The diaries and journals reflect, in both words and deeds, the defendant's hatred of anyone who interferes with the way he wants to live his life and his antitechnology views. They also reflect travel and familiarity with locations associated with Unabom events. Coded portions of the journals contain direct admissions to several of the bombings. The notes of scientific experimentation, which are written

almost entirely in Spanish, chronicle the defendant's efforts to construct ever more lethal bombs. Among other things, the notes reflect the defendant's experimentation with various bomb components, the progression of his bomb making skills and his testing of bombs for proper detonation and fragmentation. The notes also record the defendant's construction of at least seven of the Unabom devices and, in most cases, contain direct admissions and the defendant's commentary on the success of the device.

The correspondence will also be offered for a variety of purposes including further proof of the defendant's hatred of people and anti-technology views, the defendant's familiarity with books and other material referenced by the Unabomber, and as evidence of the defendant's presence in a particular location when a Unabom event occurred. Some of the letters contain admissions to being "FO" or the "Unabomber". (*8. Some of the correspondence consisted of letters which the defendant had written to his family over the years and which his family had saved and eventually returned to him. The defendant was also in the habit of copying letters which he sent to others.*)

The defendant's writings of all types will also be offered to rebut the defendant's "mental defect" defense. That defense is only valid if it negates an element of the offense, such as intent to kill. See infra at pp. 75-86. The defendant's writings, with their repeated statements of the defendant's desire to kill, his joy when he does so and his frustration when he does not, spanning more than 25 years, belie any inability to form the requisite intent.

a. Proffered writing has distinctive characteristics

As previously noted, at least with respect to the handwritten documents to which the defendant has stipulated, the government submits that no further foundation is required. It is perhaps worth mentioning however that, even without this stipulation and whether handwritten or not, many of the documents, would be admissible based on a combination of factors including their content (e.g., daily accounts of life in and around the cabin) and the fact that they were found in the defendant's cabin.

A writing may be authenticated by its contents, substance, format, or physical appearance. FRE 901(b) (4). See WEINSTEIN § 901.06[l] at 901-26. See also Alexander Dawson. Inc. v. National Labor Relations Board, 586 F.2d 1300, 1302 (9th Cir. 1978) ("The content of a document, when considered with the circumstances surrounding its discovery, is an adequate basis for a ruling admitting it into evidence") ; United States v. One 56-Foot Yacht named Tahuna, 702 F.2d 1276, 1284-85 (9th Cir. 1983) (holding diary properly admitted when contents demonstrated that diary was what government claimed it to be) ; United States v. Huguez-Ibarra, 954 F.2d 546, 952 (9th Cir. 1992) (notebooks were authenticated because they were found in defendant's home and were further corroborated by their contents and the fact that they were corroborated by the testimony of government agents) ; United States v. Spetz, 721 F.2d 1457, 1476 (9th Cir. 1983) (holding father's testimony that he had read book written by son and that he recognized proffered writing as that book sufficient authentication) ; United States v. Manning, 56 F.3d 1188, 1198-

99 (9th Cir. 1995) (holding government's proffered letter properly authenticated by evidence that it was similar in format to another already authenticated letter) ; United States v. Whitworth, 856 F.2d 1268, 1282 (9th Cir. 1988), cert. denied, 489 U.S. 1084 (1989) (holding postmarks corresponding to defendant's location on day letters mailed helped authenticate anonymous letter).

The Ninth Circuit has twice upheld district court admissions of documents authenticated only by the location where they were found. See Burgess v. Premier Corporation, 727 F.2d 826, 835 (9th Cir. 1984) (holding trial court could properly find various documents authenticated only by fact that they were found in defendant's warehouse); E.W. French & Sons. Inc. v. General Portland Inc., 885 F.2d 1392, 1398 (9th Cir. 1989) citing Burgess, 727 F.2d at 835 (holding documents sufficiently authenticated by fact that they were found in defendant's files, trial court erred in limiting document's probative value once proponent made prima facie showing of authenticity).

(1) Foundation for Spanish Documents

As previously indicated a large number of documents which the government will seek to introduce were written by the defendant in Spanish. These documents have been translated for the government by a certified court interpreter. An untranslated copy of these documents was provided to the defense on the day of indictment. A draft translation of the documents was provided to the defense on July 29, 1996, and a final translation was provided on July 30, 1997. (9. The government has sought a stipulation from the defense as to the accuracy of its translation. Although the defendant has not identified any disagreement with the government's translation he has refused to stipulate stating: "At this point we expect the government to lay the proper foundation, including authentication and chain of custody for each item of evidence offered. This would include producing the translator for the spanish and coded documents." Letter from Judy Clarke dated September 18, 1997.)

Where a certified court interpreter testifies under oath that her translation of a document is accurate and where the defendant has been given a draft and final translation prior to trial but chooses not to submit his own translation or to present his own expert to contest the accuracy of the government's translation, the translation is admissible. See United States v. Armijo, 5 F.3d 1229, 1234-35 (9th Cir. 1993) (admitting translation of taped conversation in Spanish).

Where the translation is admitted and the jury may contain one or more bilingual jurors, it is appropriate for the court to instruct the jury that it is not free to interpret the documents differently than the translation provided by the certified court interpreter. United States v. Fuentes-Montijo, 68 F.3d 352, 354-55 (9th Cir. 1995) ("The rules of evidence and the expert testimony would prove of little use if a self-styled expert were free to give his or her opinion on this crucial issue, unknown to the parties.")

(2) Foundation for Coded Documents

The government intends to call Michael Birch, a cryptanalyst assigned to the FBI, to "translate" the coded documents. Although Mr. Birch's expertise is breaking codes, in this case the key to the defendant's code was found in the cabin. Therefore, Mr. Birch's expertise will be directed to explaining to the jury how to apply the code to the defendant's coded writings and the admission into evidence of his completed translation. A complete set of the coded documents was provided to the defense on the day of indictment. A complete set of the decoded translation of the documents was provided to the defense on July 29, 1996. To date, the defendant has not identified any disagreement with the government's decoded translation.

Federal Rule of Evidence 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The government has found no case specifically admitting expert testimony regarding a numeric code. However, courts have for years routinely admitted expert testimony regarding other types of coded communications. See, e.g. United States v. Boissoneault, 926 F.2d 230, 232 (2d Cir. 1991); United States v. Theodoropoulos, 866 F.2d 587, 590-92 (3d Cir. 1989); United States v. Rollins, 862 F.2d 1282, 1292 (7th Cir. 1988). In permitting the use of experts in this context, the Court's explanation in United States v. Zanin, 831 F.2d 740, 744 (7th Cir.1987) is typical:

> In this case the jury was confronted with conversations which contained 'code words' that when considered in isolation, might seem unclear, veiled and almost nonsensical, but when analyzed properly, in the context of the totality of the evidence, can clearly be seen to be 'code words' for drugs.

As was the case in Zanin, without Mr. Birch's testimony the jury would have no way to decipher what would otherwise be a series of meaningless numbers. However, because Birch is relying primarily on the key to the code rather than his codebreaking ability, his testimony is more akin to that of a foreign language translator than to the drug agents who testified in Zanin and the other cases cited above. It therefore appears more appropriate to apply the procedure for foreign language translations set forth in United States v. Armijo, 5 F.3d 1229, 1234-35 (9th Cir. l993), supra at p. 54. Paraphrasing Armijo, the rule would then be, where an expert cryptanalyst testifies under oath that his translation of a coded document is accurate and where the defendant has been given a draft and final translation prior to trial but chooses not to submit his own translation or to present his own expert to contest the accuracy of the government's translation, the translation is admissible.

back to top

5. Demonstrative Evidence

The government will seek to introduce a scale model of the defendant's cabin and mockups of bombs 11, 13, 14, 15 and 16. Wynn Warren, Special Projects Section of the FBI, will testify that he constructed the cabin mockup from measurements he took of the actual cabin. The mockups of the bombs were made based on instructions from the explosive experts who examined the remains of the exploded bombs and eyewitness testimony regarding their approximate size and shape. Mr. Warren will also describe his procedure for building the devices and how long it took him.

"Demonstrative aids are regularly used to clarify or illustrate testimony." United States v. Salerno, 108 F.3d 730, 744 (7th Cir. 1997). Since demonstrative evidence is not "real" evidence, (*10. See Mulroy & Rychlak, Use of Real and Demonstrative Evidence at Trial, 33 TRIAL LAW. GUIDE 550, 555 (1989) (demonstrative evidence "has no probative value in itself, but serves only as an aid to the jury in comprehending testimony").*) it need not be formally admitted. See Rogers v. Raymark Industries. Inc., 922 F.2d 1426, 1429 (9th Cir. 1991). In Rogers, the Ninth Circuit has held that where the government only uses demonstrative evidence to illustrate testimony, and does not request its admission, the Rule 901(a) authentication standard need not apply. Id. Instead, use of such evidence is entirely within the discretion of the trial judge. Id.

The court may formally admit demonstrative aids into evidence. See United States v. Marchini, 797 F.2d 759, 765 (9th Cir.) , cert. denied, 479 U.S. 1085 (1986). However, the Rule 901 (a) foundation is easier to lay than for substantive evidence. The proponent of demonstrative evidence need only show that the item is a "fair depiction" or "reasonable facsimile." 5 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 532 at 125 (2nd ed. 1994); See Roland v. Langlois, 945 F.2d 956, 963 (7th Cir. 1991) ("There is no requirement that demonstrative evidence be completely accurate").

a. Models and Diagrams

Models and diagrams are common examples of demonstrative evidence used to help the jury visualize scenes or follow along with descriptions by a witness. MUELLER § 534 at 131. See Re Air Crash Disaster at John F. Kennedy Airport, 635 F.2d 67, 72-73 (2d Cir. 1980) (upholding use of diagram to illustrate glide path of aircraft); United States v. Cox, 633 F.2d 871, 874 (9th Cir. 1980) (upholding admission of mockup bombs into evidence for illustrative purposes, even where officer had to "fill in the blanks" in constructing models since real devices in question had exploded); United States v. Sanchez, 992 F.2d 1143, 1160 (11th Cir. 1993) (admitting expert's demonstration of the operation of the bomb with replica of the device). Possible differences between the mockup and the actual device go to weight not admissibility. United States v. Metzger, 778 F.2d 1195, 1204-05 (6th Cir. 1985) (possible difference between test vehicle blown up by government and actual vehicle which defendant was charged with blowing up went to weight not admissibility).

Whether or not the government seeks to formally admit this type of evidence, the foundation for authentication is the same. The foundational elements for a prima facie showing of authenticity of a diagram or model

are:

1. A visual aid would help the witness explain his or her testimony.
2. The aid depicts a certain area or object.
3. The witness is familiar with that area or object.
4. The witness explains the basis for his or her familiarity with the area or object.
5. In the witness's opinion, the aid is a "true," "accurate," good," or fair," depiction of that area or object.

See IMWINKELRIED at 66, 68.

b. Summary Charts

Federal Rule of Evidence 1006 specifically provides for the use of summary charts in cases involving voluminous material:

> The contents of voluminous writings recordings, or photographs which cannot be conveniently examined in court may be presented in the form of a chart, summary or calculation.

The purpose of Rule 1006 is to allow the use of summaries when the volume of documents being summarized is so large as to make their use impractical or impossible; summaries may also prove more meaningful to the judge and jury. United States v. Johnson, 594 F.2d 1253, 1255 (9th Cir. 1979). Such charts can "contribute[] to the clarity of the presentation to the jury, avoid[] needless consumption of time and [is] a reasonable method of presenting the evidence." United States v. Gardner, 611 F.2d 770, 776 (9th Cir. 1980).

A summary chart may be based on testimony of witnesses or on documents which have been admitted into evidence or which are admissible. Johnson, 847 F.2d at 1412. Under the rule, the summary chart is the evidence which the trier of fact may consider. Gardner, 611 F.2d at 776. While the rule only requires that the summary chart be based on admissible documents that have been previously made available to the defendant at a reasonable time and place, United States v. Foley, 598 F.2d 1323, 1338 (4th Cir. 1979) the court may require production of the underlying documents in court. Fed.R.Evid. 1006. The foundation for the admission of a chart or summary can be laid through the testimony of the witness who supervised the preparation of the exhibit. United States v. Behrens, 689 F.2d 154, 161 (10th Cir. 1982); United States v. Scales, 594 F.2d 558, 563 (6th Cir. 1979).

Summary charts must, of course, fairly and accurately reflect the contents of the documents or testimony upon which they are based. Halland v. United States, 348 U.S. 121 (1954). There is, however, no requirement that a prosecution summary chart include the defendant's version of the facts. United States v. Radseck, 718 F.2d 233, 239 (7th Cir. 1983); United States v. Ambrosiani, 610 F.2d 65, 68 (1st Cir. 1979); Myers v. United States, 356 F.2d 469, 470 (5th Cir. 1966). Summary charts need not be devoid of assumptions. "[T]he essential requirement is not that the charts be free from reliance on any assumptions, but rather that these assumptions be supported by evidence in the record." United States v.

Diez, 515 F.2d 892, 905 (5th Cir. 1975); United States v. Norton, 867 F.2d 354, 1363 (11th Cir. 1989); United States v. Lewis, 759 F.2d 1316, 1329 (8th Cir. 1985).

back to top
